



POLICE DEPARTMENT

The  
City of  
New York

-----x-----  
In the Matter of the Disciplinary Proceedings :  
  
- against - : FINAL  
  
Police Officer Andy Estevez : ORDER  
  
Tax Registry No. 941276 : OF  
  
Quartermaster Section : DISMISSAL  
-----x-----

Police Officer Andy Estevez, Tax Registry No. 941276, Shield No. 11166, Social Security No. ending in [REDACTED], having been served with written notice, has been tried on written Charges and Specifications numbered 2009-00584, as set forth on form P.D. 468-121, dated July 21, 2010 , and after a review of the entire record, has been found Guilty as charged of Specification Nos. 4, 6, 7 and 14 and Not Guilty of Specification Nos. 1, 2, 3, 5, 8, 9,10, 11, 12 and 13.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Andy Estevez from the Police Service of the City of New York.

The signature of William J. Bratton, Police Commissioner.  
WILLIAM J. BRATTON  
POLICE COMMISSIONER

EFFECTIVE:



POLICE DEPARTMENT

May 20, 2015

-----x  
In the Matter of the Charges and Specifications : Case No.  
- against - : 2009-00584

Police Officer Andy Estevez :  
Tax Registry No. 941276 :  
Quartermaster Section :  
-----x

At: Police Headquarters  
One Police Plaza  
New York, New York 10038

Before: Honorable Rosemarie Maldonado  
Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Vivian Joo, Esq.  
Department Advocate's Office  
One Police Plaza  
New York, New York 10038

For the Respondent: Andres Manuel Aranda, Esq.  
930 Grand Concourse, Suite 1A  
Bronx, New York 10451

To:

HONORABLE WILLIAM J. BRATTON  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on January 26, January 28, February 26 and February 27, 2015, charged with the following:

1. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, engaged in oral sexual conduct or anal sexual conduct with Person A by forcible compulsion, by putting his penis into the mouth of Person A. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 50(1) – CRIMINAL SEXUAL ACT IN THE FIRST DEGREE

2. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, engaged in sexual intercourse with Person A by forcible compulsion. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 35(1) – RAPE IN THE FIRST DEGREE

3. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, engaged in sexual intercourse with Person A without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 25(3) – RAPE IN THE THIRD DEGREE

4. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, did restrain Person A. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 135 05 – UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE

5. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, engaged in oral sexual conduct or anal sexual conduct with Person A without such person's consent. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 20(1) – SEXUAL MISCONDUCT

6. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, with

intent to cause physical injury to Person A did cause such injury to that person. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 120 00(1) – ASSAULT IN THE THIRD DEGREE

7. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, with intent to harass, annoy or alarm Person A said Officer did strike, shove, kick or otherwise subject Person A to physical contact or attempted or threatened to do the same. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 240 26(1) – HARASSMENT IN THE SECOND DEGREE

8. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, did subject Person A to sexual contact by forcible compulsion by putting his penis into the mouth of Person A. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 65(1) – SEXUAL ABUSE IN THE FIRST DEGREE

9. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, did subject Person A to sexual contact by forcible compulsion by putting his mouth onto the breast of Person A. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 65(1) – SEXUAL ABUSE IN THE FIRST DEGREE

10. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, in the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article 130 of the Penal Law which requires corroboration for conviction, or immediate flight therefrom, did cause physical injury to Person A, who was not a participant in the crime. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 120 05(6) – ASSAULT IN THE SECOND DEGREE

11. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, did engage in oral sexual conduct or anal sexual conduct with Person A without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent, by putting his penis into the mouth of Person A. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

NYS Penal Law Section 130 40(3) – CRIMINAL SEXUAL ACT IN THE  
THIRD DEGREE

12. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, did subject Person A who was incapable of consent by reason of some factor other than being less than seventeen years old, to sexual contact by putting his penis into the mouth of Person A. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 60(1) – SEXUAL ABUSE IN THE SECOND  
DEGREE

13. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, on or about February 15, 2009, in the County of the Bronx, did subject Person A who was incapable of consent by reason of some factor other than being less than seventeen years old, to sexual contact by putting his mouth on the breast of Person A. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS  
NYS Penal Law Section 130 60(1) – SEXUAL ABUSE IN THE SECOND  
DEGREE

14. Said Police Officer Andy Estevez, while assigned to Transit Borough Manhattan Task Force, while off duty, on or about and between February 15, 2009 and February 16, 2009, did fail and neglect to properly safeguard his firearm in that said Police Officer placed his firearm in his backpack and it was not in a locked, fixed container. *(As amended)*

P.G. 204-08, Page 2, Paragraphs 7 & 8 – FIREARM GENERAL REGULATIONS  
UNIFORMS AND EQUIPMENT

The Department was represented by Vivian Joo, Esq. and Respondent was represented by Andres M. Aranda, Esq. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Police Officer Person A, Captain Patrick Davis, Sergeant Daniel Gagliardi, Sergeant Francisco Perez, Detective Christopher Florio and Lieutenant Sean Conry as witnesses. Respondent called Paulina Gomez as a witness and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After evaluating the testimony and evidence presented at the hearing, and assessing the credibility of the witnesses, this tribunal finds Respondent guilty of the misconduct set forth in Specifications 4, 6, 7 and 14. This tribunal finds Respondent not guilty of the misconduct set forth in Specifications 1, 2, 3, 5, 8, 9, 10, 11, 12 and 13.

FINDINGS AND ANALYSIS

The resolution of this case turns purely and simply on questions of credibility. Only Respondent and his [REDACTED] Person A, know with certainty what actually occurred in her apartment on February 15, 2009; and yet, their accounts of what transpired that day are entirely different. Respondent asserts that they had an amicable encounter and that nothing unusual occurred. Person A claims that she was brutally attacked and sexually assaulted by Respondent. Thus, it is left to this tribunal to sort out from the evidence which version of events is closest to the truth.

The following facts are undisputed. Respondent and Person A are uniformed members of service who met in 2006 while enrolled at the Police Academy. They started a romantic relationship, [REDACTED] [REDACTED]

[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED] (Tr. 22-23, 321-22).

Respondent and Person A stopped living together in April 2008 when Person A [REDACTED] moved to [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] (Tr. 23-25, 82-84, 324-25).

Person A invited Respondent to her apartment to have dinner on February 14, 2009. Their relationship had become especially strained after [REDACTED]

[REDACTED] Person A's intent was to speak to Respondent about "fixing their relationship" [REDACTED] Respondent brought Person A flowers. They had a "friendly" dinner and talked amicably, but did not engage in any sexual activity that night. (Tr. 25-27, 82, 93-95, 323-26).

Person A was scheduled to work at the [REDACTED] Precinct on February 15, 2009. She did not show up for roll call which was conducted at 1515 hours. When Captain Patrick Davis became aware of her absence, he asked Sergeant David Gagliardi to follow-up. Sergeant Gagliardi called Person A's cell phone and asked if she was coming to work and whether she was sick. She responded in the negative to both questions. He then asked whether she was "okay." Person A answered "no" and hung up. During a second phone conversation Person A told Sergeant Gagliardi that she had been assaulted by her [REDACTED] and that she had injuries to her face. She also informed him that the assailant was a police officer.

Captain Davis reported the incident to the [REDACTED] Precinct and asked Sergeant Gagliardi to go to Person A's home to ensure that she was safe. Upon their arrival, Person A told Sergeant Gagliardi and Sergeant Francisco Perez, from the [REDACTED] Precinct, that she had been beaten and raped. Both witnesses reported seeing injuries to Person A's neck and face. This information was related back to Captain Davis. Sergeant Gagliardi and another officer from the [REDACTED] Precinct drove Person A to [REDACTED]

POLICE OFFICER ANDY ESTEVEZ

[REDACTED] where a rape kit was administered. Captain Davis met them there. (Tr. 24-25, 127, 131-39, 148, 153-58, 199).

The Internal Affairs Bureau (“IAB”) directed Detective Christopher Florio to 1115 Grant Avenue for the purpose of conducting a forensic investigation of a potential sex crime. He recovered and preserved evidence at the scene including clothes and a knife in the bedroom. Detective Florio also used a crime scope with ultraviolet light to search for biological fluids. None were found. Detective Florio described Person A’s apartment as “neat” and saw no “apparent signs of struggle.” (Tr. 240-55).

The IAB duty captain directed Lieutenant Sean Conry to locate Respondent. At about 2230 hours, he went to [REDACTED] where Respondent lived with his mother, Person B, who communicated with the police through a neighbor who served as an interpreter. She was able to reach her son on his cell phone. Lieutenant Conry used Person B’s phone to talk to Respondent and ascertain his location. While in Person B’s apartment, Lieutenant Conry retrieved Respondent’s service firearm from a backpack in his bedroom. The firearm was not properly safeguarded at the time. (Tr. 259-82).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Tr. 88, 338-48; Respondent’s Exhibit (“RX”) B).

After [REDACTED] Respondent and Person A “became civil with each other.” Although they are no longer together as a couple, they have an amicable

relationship, [REDACTED]

[REDACTED] At trial, Person A described Respondent as a [REDACTED] a "good person" and a "good friend." (Tr. 24, 62, 85).

At issue is whether, on February 15, 2009, Respondent engaged in the charged misconduct which includes assaulting, raping, sodomizing and forcibly restraining Person A. Respondent denies that there was any type of assault, altercation or sexual encounter, forced or otherwise, on the day at issue. At trial he confirmed that Person A invited him to her home to have dinner on Valentine's Day 2009. He emphasized that

[REDACTED] had put a strain on their relationship and that Person A wanted to talk [REDACTED] and a possible reconciliation. At that time Respondent still considered Person A [REDACTED] [REDACTED] but he had "stopped being with her." In spite of their problems, Respondent believed that he "was still in love with her" and "she was still in love with [him]" and they continued to have "sexual encounters." (Tr. 324-25, 329, 349-50).

Respondent accepted her invitation and arrived at her home at about 2000 hours with flowers. He testified that Person A wanted him to move back in with her but he would not agree until [REDACTED]. According to Respondent, she "looked upset." They talked until midnight and because it was late she suggested that he stay over. Respondent testified that they simply fell asleep and that they did not engage, or attempt to engage, in any sexual activity. The next morning he bought breakfast for them at a local store and returned to the apartment to eat together. Person A was wearing a Police Academy t-shirt and shorts at the time. Respondent testified that he left

Person A's apartment at about 1000 hours and returned to his mother's home in Manhattan, where he lived. He then borrowed his father's car and visited family in Queens. (Tr. 326-29, 330-33, 341-42, 349, 350).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Respondent also testified that he learned through Person A's aunt that she had made a prior false claim against another man. (Tr. 341-42).

Person A's version of events differs significantly. Although she does not dispute that they had an amicable dinner at her home on Valentine's Day 2009, from that point on their narratives diverge. According to Person A, Respondent left her house after their Valentine's dinner and denies that he slept at her apartment that night. She was surprised when he returned uninvited the following morning. Person A let him in and told him she was going to take a shower while he watched television. Respondent knocked on the bathroom door and insisted that she come out. When she eventually did, he confronted her with a number he found on her phone which belonged to another man. Person A returned to the bathroom. From there she could hear Respondent walking back and forth as he cried and threatened to kill himself if she did not come out. When she opened the door, she saw him "acting like he was going to kill himself" by "faking like he was stabbing himself" with her kitchen knife. She took the knife and threw it [REDACTED]

[REDACTED] Respondent became enraged and pushed her and banged her head against the bathtub. (Tr. 27-33, 55-56, 89, 96-98, 100-02, 107-08).

Person A admitted to Respondent that she was seeing someone else. Respondent became “furious” and proceeded to call her a “bitch” and a “cunt.” Although it was difficult for Person A to relate the exact sequence of events, she testified that Respondent “dragged” her to the bedroom and began “choking” her with the Police Academy t-shirt she was wearing. When Respondent found incriminating photos on her cell phone, he cried as he insulted her, covered her mouth and choked her again. Person A recollects that Respondent “made numerous phone calls” from her kitchen but she did not hear what he said. The one call she specifically recalls was to the Dominican Republic during which Respondent told her to say goodbye to her grandmother [REDACTED]. They were both crying and he eventually disconnected the house phone. (Tr. 33-42, 49-50, 53, 68, 104, 120).

Despite Person A’s pleas, Respondent would not leave. He continued to question her about the affair and asked whether the other man “was better than him” and whether she had been with “somebody else sexually... because he wasn’t good enough.” At one point Respondent threw Person A on the floor next to the couch, took out his penis and told her “you cannot even get me hard, bitch.” He took out his penis and demanded that Person A perform oral sex, but she refused. He reacted by grabbing the back of her head and pushing her head toward his limp penis. At trial she denied actually performing oral sex or having his penis inserted into her mouth. Person A also testified that Respondent was “mad” because she had gotten a breast augmentation and that he bit and punched her chest. (Tr. 43-48, 53-54, 105, 108-09, 119).

Although at one point she was no longer clothed, Person A could not recall how her underwear had been removed. Person A testified that the Respondent “tried having

sex" with her but she "told him no." Specifically, she told the tribunal, "...I don't know how to explain it. Like he was in front of me, on top of me and he tried to insert his private part, and I told him no, I don't want to have sex with you." When asked to clarify, she confirmed that Respondent tried to insert his penis in her vagina even though he never got an erection and his penis remained "limp." According to Person A "I don't remember feeling his private parts inside of me. I remember the attempt.... I told you we did not have sex and that he attempted to penetrate me." As he tried to penetrate her, she told him to stop "several times." Eventually he did. (Tr. 48-49, 109-10, 125, 127-28).

Person A told this tribunal that she asked Respondent to leave, but he refused. She stated that during the incident she called 911 "several times" but did not recall telling the operator she was a police officer. She was "hoping they could hear him throw the phone and come and help." At trial she acknowledged that there was no documentation of those calls that she could recall. She testified, however, that the District Attorney's Office found records of 911 calls that could not be traced and the person could not be identified because it sounded like somebody could not breathe on the other end. (Tr. 68-70).

Respondent left after about six hours. (Tr. 43). Person A described herself as "being very confused," "crying" and in "a lot of pain" after the attack. She explained:

... I cannot sit here and say I had this and that, because I don't specifically remember what part of my body I had injuries, but I do remember having a lot of pain and being very confused. I remember having a lot of pain on my neck.... Like I said, my whole body was hurting me.... I remember being assaulted but I don't – like I said, I cannot sit here and say I had a bruise on my arm, a bruise on my leg, because I don't remember.... So many hours happened and so many things happened the most that I remember is my neck and my chest... (Tr. 51-53).

Between 10 to 20 minutes later, Respondent returned, but she refused to open the door and told him that she was getting ready to go to work. He noted that she had not eaten anything all day and left a chicken wrap at the door. She retrieved it after he left and threw it away. (Tr. 57, 65-66).

Upon Respondent's departure, Person A felt "dirty" and believed that she smelled "bad," like "saliva." She went around "fixing the house, fixing the bed, taking a shower and washing [her] hair." Person A recalls thinking that if she could get to work "nobody would know" and she could "keep going on with [her] life." She did not call 911. When Sergeant Gagliardi called she was "confused," "crying" and "running around the house." (Tr. 58-59, 67, 113).

Person A volunteered that she is currently in therapy. On cross-examination she asserted that Respondent had hurt her prior to February 15, 2009. She confirmed that she and Respondent have had "numerous conversations about what happened and he's sorry. He's in a better place." Person A elaborated:

I felt that everything that was happening was my fault because I wasn't honest with him. I felt like I was playing mind games as to if our relationship was ever going to get better. I felt bad for him and I felt bad and I felt bad because I felt like he really loved me and I just didn't love him the same way.

(Tr. 56, 63, 86).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than the task of attempting to reconstruct the most probable nature of a past event on the basis of conflicting testimonial accounts. While the law creates the framework within which such a task is accomplished, the ultimate determination of which account to accept depends almost solely on an assessment of witness credibility. That assessment remains the exclusive province of the fact finder.

In making such an assessment, the trier of fact should consider a wide range of factors, including but not limited to, witness demeanor, corroborating evidence, the consistency of a witness account both at trial and over time, the degree to which the witness is interested in the outcome of a case, the potential prejudice or bias of the witness, and perhaps most basically the degree to which the witness accounts are logical and comport with common sense and general human experience.

In this case, untangling the truth from the record is particularly onerous because Respondent and Person A have a complicated relationship and because both are uniformed members of service. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] On the other hand, Person A could jeopardize her own career by refusing to testify, recanting claims or making false statements.

Second, although Person A was compelled to testify at this trial, she appeared to be a reluctant witness. This is not unusual for victims of violence. Moreover, the charges here carry the potential for serious consequences and even stigma beyond the context of Respondent's current employment. [REDACTED]

[REDACTED]

Third, by all accounts, Person A and Respondent are now in a "good place" [REDACTED] [REDACTED] Person A's ambivalence about her appearance was underscored by her tearful testimony describing Respondent as a [REDACTED] [REDACTED] and "good friend" and her stated belief that he was "sorry" and that "everything

that was happening was ...[her] fault" because she was "playing mind games" and "didn't love him the same way."

As an overlay to this dynamic are the particular complexities of assessing allegations of sexual assaults. This tribunal is aware that it is often difficult for victims to report sexual assaults. In fact, even after taking the step to file a report it is not unusual for victims to withhold what they consider to be embarrassing details. The emotional complications of bringing such charges, however, must always be weighed against Respondent's due process right to have all evidence suggesting that the incident did not occur fairly evaluated and considered. It is within this context that I make the following findings of fact.

Specifications 2, 3, 1, 5, 8, 9, 10, 11, 12 and 13;  
Alleged Sexual Contact, Rape and Oral Sex by Forceable Compulsion

Specifications 2 and 3 charge Respondent with engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department by having sexual intercourse with Person A by forceable compulsion and without her consent in violation of Penal Law Sections 130.35(1) and 130.25(3). Although I credit much of Person A's testimony concerning forcible sexual contact, after reviewing the record in its totality, I find that the proof was insufficient to sustain the specific charges alleging that Respondent raped Person A.

In making this finding I acknowledge that much of Respondent's testimony seemed self-serving and contrived. Simply put, I did not believe Respondent's testimony that he had a pleasant Valentine's Day dinner with Person A and left the next morning without incident. Notwithstanding the questionable nature of Respondent's account,

because Person A made inconsistent statements as to whether there was actual penetration, her account at trial did not support the charge of rape.

No clear conclusion can be drawn from Person A's hearing demeanor. During most of her direct examination, she became extremely emotional and at times was barely able to continue with the examination. She cried, and repeatedly stated that this was "very hard" for her, that she was "confused" as a result of the assault and that she was "trying to remember." (Tr. 55). Her extreme emotional reaction was understandable given the nature of her claims. However, whether she became distraught at being compelled to testify about rape allegations, having to relive the attack or [REDACTED] [REDACTED] or all three, I was unable to discern.

What is clear, however, is that Person A presented one version of the rape allegation in her sworn criminal court affidavit and another version of the rape allegation at trial. The criminal court affidavit signed by Person A on February 16, 2009, clearly alleges that Respondent both attempted to rape her and then raped her by forcibly inserting his penis in her vagina on more than one occasion. Specifically, the affidavit states irrelevant part:

Deponent states that the defendant held deponent inside the living room and attempted to place his penis inside her vagina while seated on a couch. Deponent further states that she struggled with defendant keeping her legs closed and pushing against his chest.

Deponent further states that the defendant then threw deponent upon the ground where he forced deponent's legs open and placed his penis inside her vagina.

Deponent further states that the defendant states in sum and substance YOU DON'T EVEN MAKE ME HARD BITCH and then removes his penis and places his hands on his penis and moves his hands in an up and down motion to make his penis erect and then inserted his penis inside deponent's vagina again against her will.

Deponent further states that she then attempts to move away from defendant and defendant continues to masturbate while coming towards deponent and then inserts his penis inside deponent's vagina. Deponent further states that the defendant then grabs her about the neck and head and forces her head towards his penis. (RX B).

The Investigating Officer's Report also notes Person A as stating that Respondent "forcibly had sexual intercourse with her." (Court Exhibit ("CX") 1).

In contrast, at trial Person A repeatedly denied that there was any penetration. She testified that Respondent "tried having sex" but never got an erection and did not insert his penis in her vagina. According to Person A, "I don't remember feeling his private parts inside of me. I remember the attempt.... I told you we did not have sex and that he attempted to penetrate me." More importantly, she recalled telling him "no" "several times" and that he stopped.

Moreover, although evidence was collected at the scene and Person A was treated at a hospital, no physical or medical evidence was presented at trial to corroborate that a rape occurred. First, it is undisputed that a rape kit was administered with a negative result. (Tr. 128). Second, a scope with an ultraviolet light was used to search the crime scene for biological fluids such as semen, but none were found. Third, clothes and other items were collected at the scene, including the Police Academy t-shirt Person A wore, but test results were unavailable.

While this tribunal understands that given the vagaries of human memory any witness might forget certain details of an event that occurred six years ago, this is a major inconsistency that raises serious questions of law and fact. To prove rape as charged under the Penal Law requires a finding of forcible vaginal penetration. Penal Law, art. 130, § 130.00 (1). Even where penetration was attempted and very nearly achieved,

New York courts have refused to uphold a verdict of rape where actual penetration was not achieved. For example, the Court of Appeals overturned a conviction of rape in *People v. Carroll* on the grounds that there was no specific testimony that defendant put his penis inside the victim as well as no medical evidence showing penetration had occurred. 95 NY2d 375, 383-84 (2000). The victim had testified only to vaguely recalling “feeling pressure between her legs and inside her vagina” but never saw defendant’s penis and did not remember any other details. *Id.* In *People v. Porlier*, the Third Department of the Appellate Division reversed a conviction of rape in the first degree, finding that the evidence failed to prove rape because the victim had only alleged that the defendant attempted to put his penis in her vagina and “tried to have sex with her.” 55 AD3d 1059, 1061 (3d Dept 2008). Absent other evidence, the court found that “the evidence is legally insufficient to establish penetration, as opposed to [mere] touching or external contact of the sexual parts.” *Id.*<sup>1</sup> Accordingly, Person A’s statements in and of themselves constitute an insufficient basis on which to sustain the rape allegations set forth in Specifications 2 and 3.

Specifications 1, 5, 8, 11 and 12 charge Respondent with engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department by forcing his penis into Person A’s mouth without her consent in violation of Penal Law sections 130.50 (1), 130.20 (1), 130.65 (1), 130.40 (3) and 130.60 (1). Here too, Person Amade

---

<sup>1</sup> Most recently, the Third Department upheld a dismissal of a first degree rape charge where the victim had denied at trial that defendant’s penis penetrated her vagina but testified that his penis touched her vagina and rubbed against it without entering it. *People v. Newkirk*, 75 AD3d 853, 858 (3d Dept 2010); see also *People v. Brown*, 96 AD3d 1561, 1562 (4th Dept 2012) (finding that the jury was entitled to infer from the evidence at trial that defendant forcibly committed an act of penis to-vagina contact that qualified as sexual contact (Penal Law §130.00 [3]), but that same stopped short of sexual intercourse, i.e., “penetration,” required for rape (Penal Law §130.00 [1])); *People v. Durn*, 204 AD2d 919 (4th Dept 1994) (holding that a conviction for rape must be overturned where the victim gave no testimony mentioning penetration, only touching, and there was no medical evidence indicating penetration nor an admission of penetration by the defendant).

contradictory statements which raised some measure of concern and resulted in insufficient evidence to establish the charges.

Person A's sworn criminal court affidavit unambiguously avers that she was forced to perform oral sex and that Respondent placed his penis in her mouth. The relevant paragraphs of the affidavit are set forth below:

Deponent further states that she then attempts to move away from defendant and defendant continues to masturbate while coming towards deponent and then inserts his penis inside deponent's vagina. Deponent further states that the defendant then grabs her about the neck and head and forces her head towards his penis.

Deponent further states that the defendant then places his penis inside her mouth and pushes deponent's head up and down.... (RX B).

At trial, Person A failed to confirm that she was compelled to engage in oral sex or that Respondent's penis had any contact whatsoever with her mouth. She testified before this tribunal that Respondent took out his penis, and that he wanted her to perform oral sex on him, but she refused. According to Person A, he grabbed the back of her head and pushed her head toward his "limp" penis. She was emphatic, however, that she did not perform oral sex. (Tr. 109).

Just as the courts have stringently adhered to the definition of sexual intercourse when confronted with a rape claim, the law similarly requires contact between the mouth and the penis to establish oral sex as defined in Penal Law, art 130, § 130.00 (2).

Accordingly, there is insufficient evidence in the record to prove Specifications 1, 5, 8, 11 and 12.

The evidence presented also failed to substantiate the charge that Respondent subjected Person A to sexual contact by putting his mouth onto her breast in violation of Penal Law, art 130, §130.65 (1). At trial, Person A testified as follows:

I do remember that he was mad because I got the breast augmentation. I do remember him at one point sort of like biting me, but that's as much as I remember... on my chest. (Tr. 53-54).

This tentative trial assertion of a bite, however, was not corroborated by Person A's criminal court affidavit or by the independent observations of the responding officers. Accordingly, I find that Specification 9 was not proven at trial.<sup>2</sup>

Specifications 4, 6 and 7:  
Alleged False Imprisonment, Assault, and Physical Injury

Although Respondent was acquitted of all criminal charges brought against him, the Department alleges that his actions amounted to violations of the Penal Law warranting disciplinary action. Respondent is charged with engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department by:

- restraining Person A in violation of Penal Law, art 135, §135.05 - Unlawful Imprisonment in the Second Degree<sup>3</sup> (Specification 4)
- intentionally causing physical injury to Person A in violation of Penal Law, art 120, § 120.00 (1) – Assault in the Third Degree<sup>4</sup> (Specification 6)
- intentionally striking, shoving, kicking or otherwise subjecting Person A to physical contact in violation of Penal Law, art 240, § 240.26 (1) – Harassment in the Second Degree<sup>5</sup> (Specification 7)

The record contains factors that weigh against the credibility of the complaining witness. For example, the inconsistent statements discussed above create some doubt

---

<sup>2</sup> Inasmuch as no felonies were proven at trial, Specification 10, which cites Penal Law, art 120, § 120.05 (6) – Assault in the Second Degree, must also be dismissed. Likewise, I find Penal Law, art 130, §130.60 (1) - Sexual Abuse in the Second Degree inapplicable to this case. Accordingly I find Respondent not guilty of Specifications 10 and 13.

<sup>3</sup> Penal Law, art 135, §135.05 - Unlawful Imprisonment: A person is guilty of unlawful imprisonment in the second degree when he restrains another person.

<sup>4</sup> Penal Law, art 120, §120.00 (1) - Assault in the Third Degree: A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person.

<sup>5</sup> Penal Law, art 240, §240.26 (1)- Harassment in the Second Degree: A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person: 1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same.

about the dependability of Person A's account. If these challenges to her reliability were standing alone, it would be straightforward to dismiss all of her allegations as a fabrication. This tribunal, however, must weigh this evidence against the entire record. After carefully considering the conflicting accounts, and all other proof presented at trial, I find that the Department satisfied its burden of establishing by a preponderance of the credible evidence that Respondent engaged in the misconduct charged in Specifications 4, 6, and 7.

At trial Respondent insisted that he did nothing wrong and denied restraining, hitting, punching, choking, injuring, harassing, or biting Person A. The preponderance of the credible evidence, however, belies his claim. There were a number of key factors that corroborated and supported Person A's version of events on these specific charges. The most compelling are discussed below.

First, Person A's trial testimony concerning Specifications 4, 6 and 7 was substantially consistent with the assertions she made in her sworn criminal court affidavit. In both, Person A convincingly described a harrowing and humiliating sexual and physical attack which resulted in significant pain and physical injuries. With great emotion and difficulty, Person A confirmed at trial the allegations in her criminal court affidavit that Respondent:

- pushed her causing her to hit her head on the bath tub (Tr. 107; RX B)
- restrained and choked her in the bedroom using a Police Academy t-shirt (Tr. 35-36, 52-53; RX B)
- choked her a second time and covered her mouth with his hand (Tr. 35-36, 52-53; RX B)
- pretended to turn a knife on himself to get her out of the bathroom (Tr. 32-33; RX B)
- restrained and struck her causing injury and pain (Tr. 52-53, 105-07; RX B)
- banged her head against a wall (Tr. 107; RX B)

- called her grandmother [REDACTED] in the Dominican Republic and told her to say goodbye. (Tr. 37, 40; RX B)
- threw her against the living room floor (Tr. 44-45; RX B)
- exposed his penis and touched himself while telling Person A “you cannot even get me hard, bitch” (Tr. 44-45; RX B)
- caused bruising, swelling and redness to the face, bruising to her breasts as well as substantial pain to her neck and body (Tr. 51-54; RX B)

This tribunal notes that there were certain discrepancies between Person A’s criminal court affidavit and her trial testimony. For example, at trial Person A recalled being punched in the chest but not being punched in the face. This type of relatively minor discrepancy, however, is not surprising given the vagaries of memory that can result when attempting to recall an incident that occurred six years ago – particularly a violent one that included blows to the head. As she credibly explained at trial, testifying about the assault was “very hard” and therefore:

I can’t sit here and say this happened and that happened because it’s a very long time ago. (Tr. 33) ... I remember being very confused. I remember having a lot of pain. I cannot sit here and say I had this and that, because I don’t specifically remember what part of my body I had injuries, but I do remember having a lot of pain and being very confused. I remember having a lot of pain on my neck ... my whole body was hurting. I remember being assaulted but I don’t I cannot sit here and say I had a bruise on my arm, a bruise on my leg, because I don’t remember. So many hours happened and so many things happened ... the most that I remember is my neck and my chest....I do remember having pain, mostly pain. (Tr. 51-53).

Second, although no physical evidence was presented at trial, the testimony of both Sergeants Gagliardi and Perez corroborated Person A’s assertions about her demeanor and that she suffered injuries consistent with the charged misconduct. Sergeant Gagliardi, testified that when he arrived at Person A’s home he observed injuries to her face and neck and that he “realized at that point she was assaulted.” He described Person A’s face as bruised and swollen and noticed “what appeared to be finger like hand marks around her neck.” Specifically, both cheeks and by her eyes were

swollen and there were “scratches,” “bruises” and “scars” on her upper chest, neck and face. (Tr. 151-52, 164-66, 171). Sergeant Perez, an officer who responded from the [REDACTED] Precinct, confirmed that he also observed “some swelling and redness” from Person A’s forehead to her neck as well as “finger marks” on her neck. (Tr. 197, 211-12).

Attempts to discredit this corroborating evidence were unsuccessful. During cross-examination, Respondent’s Counsel tried to establish that Sergeant Gagliardi was biased because he was friendly with Person A. Although the record verified that they were colleagues who socialized, the proof fell short of establishing a relationship that was likely to result in undue bias. Furthermore, the probative value of his observations was not diminished because Gagliardi admittedly played the role of “consoler” to Person A and was not sent to the scene to conduct an official investigation. Captain Davis appropriately sent Gagliardi to Person A’s home to ensure the well-being of a member of service under his command knowing that the actual investigation would be conducted by the [REDACTED] Precinct and IAB. Moreover, Sergeant Perez, a member of the [REDACTED] Precinct who did not know Person A, verified Gagliardi’s observation that Person A was injured about the neck and face. That Sergeant Perez could not recall which side of Person A’s face was affected was in all likelihood caused by the passage of time since the event and not indicia of unreliability.

Third, Sergeants Gagliardi and Perez’s accounts of Person A’s excited utterances and fearful demeanor are convincing evidence that Respondent’s visit to Person A’s home ended very badly. Sergeant Perez found Person A in an emotional state and described her as “upset, distraught, [and] crying.” According to Sergeant Perez, “all she kept saying was he did it, he did it. I asked who [and] she said Andy her ex-boyfriend or

husband.” At one point she became “incoherent” and was “crying to the point that I had to wait a moment for her to catch her breath so she could explain what happened.” (Tr. 198, 226-27). Sergeant Gagliardi confirmed that Person A was “crying” and that she was “frightened,” “scared” and in a “state of shock.” According to Sergeant Gagliardi, Person A identified Respondent as her assailant and continually expressed concern for her safety by “repeating several times” that she thought she was going to “die” because he “was going to kill me.” Person A told him that she kept her firearm in the precinct because she “thought he was going to kill [her].” (Tr. 151-54, 157, 172-74, 180).

It is in this state that Person A told Sergeant Perez what had occurred. When he asked she recounted how her “ex” had come to her apartment. She let him in but when she was in the shower he knocked on the bathroom door insisting that they talk. Person A told Sergeant Perez that Respondent became enraged when she said it was over between them. He slapped and punched her and “used a t-shirt that she had on” to “strangl[e] her.” She showed him the t-shirt. Person A also informed him that Respondent pushed her to the ground and “forced himself into her.” (Tr. 198-99, 207-08, 219-20).

The terrified assertions Person A made to Sergeants Perez and Gagliardi constitute contemporaneous statements identifying Respondent as her assailant and documenting her fear of further harm. The panic both Sergeants identified in her voice and demeanor during this initial encounter are palpable indicators that Person A was truthful at the time when she told them she was restrained, beaten and choked by Respondent. The spontaneous and excited nature of such statements can be accorded significant probative weight because they are:

made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him.

*People v. Brown*, 70 NY2d 513, 518 (1987).

This is especially true where, as here, the police reached out to Person A thus minimizing the likelihood that her claims were staged. If Person A wanted to cause trouble for Respondent by making a false claim against him it is likely that she would have initiated contact with the police. Thus, Person A's statements to Sergeants Gagliardi and Perez have the indicia of reliability attributed to spontaneous declarations and excited utterances.

Fourth, Respondent made an incriminating statement [REDACTED] on the evening of February 15, 2009. Lieutenant Conry credibly testified that when he first spoke to Respondent on the phone he explained that he needed to see Respondent in person. Respondent's unprompted reply was to ask whether "this has something to do with what happened with [Person A]" (Tr. 266). This statement was quite telling. I could discern no reason for Respondent to have asked this question if he had simply left Person A's apartment after an amicable dinner and breakfast. Moreover, Lieutenant Conry exhibited no animus against Respondent and no motive to fabricate this statement. This was akin to a statement against interest that weighed against Respondent's assertion of innocence. See *People v. Maerling*, 46 NY2d 289, 295 (1978) ("Simply stated, in the case of declarations against interest, the theory is that such assurance flows from the fact that a person ordinarily does not reveal facts that are contrary to his own interest. Therefore, the reasoning goes, absent other motivations, when he does so, he is

responding to a truth-revealing compulsion as great as that to which he would likely be subjected if cross-examined as a witness.”).

Likewise, I credited Lieutenant Conry’s straightforward and credible testimony that Respondent’s mother told him that Respondent had been upset that afternoon due to some type of altercation with Person A and that “he struck [Person A] but only after [she] had struck him first.” (Tr. 262-63). Although at trial, Person B denied making this statement to either Lieutenant Conry, or to the neighbor who served as an interpreter, on balance, Lieutenant Conry proved to be the more credible witness.

Accordingly, I find that the conduct shown in the instant proceeding by the preponderance of credible evidence established that Respondent violated Patrol Guide Section 203-10, Page 1, Para. 5, by engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department as set forth in Specifications 4, 6, and 7.<sup>6</sup> I also find that the evidence presented was sufficient to satisfy the required elements of the Penal Law sections cited therein. Specifically, the Department proved that:

Respondent restrained Person A against her will in violation of Penal Law, art 135, §135.05 – Unlawful Imprisonment in the Second Degree. Under Penal Law §135.00 (1), to “restrain” means to:

restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by … confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. A person is

---

\* In making these findings, I acknowledge Respondent’s argument that certain aspects of Person A’s statements raised some measure of concern. For example, Person A testified that she tried calling the police during the attack and hoped that they would hear the commotion and send someone to the apartment. (Tr. 41). Although there are no Sprint reports in evidence substantiating this claim, Person A did state that the ADA assigned to the case had records of phone calls but could not make out the address or who was calling because it sounded like the caller could not breathe on the other line. (Tr. 68-70). Respondent’s counsel also argued that if an attack had actually occurred Person A would not have cleaned the apartment and showered after Respondent left because as a trained officer she would have wanted to preserve the crime scene. (Tr. 66, 110, 112). Person A, however, credibly testified that she was confused after the attack and just wanted to go to work and ignore what had occurred. This is not an unusual reaction under the circumstances, even for a police officer when she finds herself to be the victim of a crime.

so moved or confined "without consent" when such is accomplished by (a) physical force, intimidation or deception. . . .

I credited the testimony that Person A was not free to leave and that she was physically held as she was being beaten and choked by Respondent for the duration of the attack. Given the totality of circumstances, I further infer that Respondent knew that such restriction was unlawful.

Respondent intentionally caused physical injury to Person A in violation of Penal Law, art 120, §120.00 (1) – Assault in the Third Degree and art 240, § 240.26 (1) –Harassment in the Second Degree. As discussed in detail above, I credited Person A's corroborated testimony that she suffered substantial injuries as a result of Respondent's physical assault. It is important to note that the testimony of both Sergeant Gagliardi and Sergeant Perez's concerning Person A's state of mind and visible injuries was persuasive. That they both observed "finger marks" on Person A's neck was especially compelling. A "finger mark" is a very specific detail which has significant probative weight particularly when noted by two independent witnesses. The specific observations of these two witnesses support Person A's account that Respondent assaulted, choked and injured her as she stated in her trial testimony and criminal court affidavit. Moreover, her bruising, swollen face, choke marks, and the pain suffered as a result of the violence, were sufficiently serious to meet the elements of the Penal Law sections cited. See *People v. Terrero*, 31 AD3d 672 (2d Dept 2006); *People v. Cerkendall*, 12 AD3d 710 (3d Dept 2004). Likewise, the required proof of intent can be inferred from Respondent's conduct and surrounding circumstances. See *People v. Bracey*, 41 NY2d 296, 301 (1977); *People v Caulkins*, 82 AD3d 1506 (3d Dept 2011); *People v Collins*, 178 AD2d 789, 789-90 (3d Dept 1991).

Specification 14:  
Failure to Safeguard Firearm

Respondent acknowledged at trial that on February 15, 2009, he left his firearm unsecured in a backpack in his room and that in doing so failed to follow procedures requiring that he safeguard his firearm. (Tr. 357-360) Accordingly, he is found guilty of Specification 14.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY2d 222 (1974). Respondent was appointed to the Department on July 10, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department Advocate argued that dismissal is the appropriate penalty in this case. For the reasons set forth below, I agree that Respondent's misconduct merits termination.

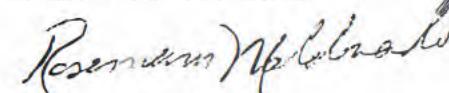
It is surely true that most disciplinary cases involving physical altercations do not result in termination. Respondent's conduct in the instant case, however, was especially troubling and egregious. First, in addition to hitting and shoving Person A, Respondent also choked her and hurt her leaving finger marks on her neck. Second, this was not a single, impulsive act of violence. Respondent restrained Person A against her will and attacked her repeatedly over the course of several hours. Third, although I found insufficient evidence to sustain the charges relating to rape and oral sex by forcible compulsion, I do credit Person A's testimony that during the attack he exposed his penis, manipulated it in an effort to masturbate and further humiliated her by stating, "you

cannot even get me hard, bitch." These aggravating factors raise questions about his ability to serve this Department. After careful consideration, I conclude that Respondent's acts, for which he has taken no responsibility, constitute egregious misconduct that cannot be condoned.

In making this recommendation I acknowledge that he has not had another violent episode in the past six years. However, his tenure and personnel history are not compelling mitigation for violent conduct that is fundamentally inconsistent with his sworn duty to protect, and not endanger, the public. *See Disciplinary Case Nos. 84703/08 & 84721/08* (February 1, 2011) (five-year police officer with no prior disciplinary record is dismissed from the Department for his conduct relating to a physical dispute in which he choked his wife and told her that he preferred her dead. He was also found guilty of intentionally failing to report that his wife took his revolver and fired.); *see also Disciplinary Case Nos. 2007-1269, 2009-1271 & 2009-1284* (September 18, 2013) (twelve-year police officer with no prior disciplinary record is dismissed from the Department for slapping, stalking, and driving at a high rate of speed toward his ex-girlfriend. In addition, Respondent violated an order of protection and on two occasions fled from responding Suffolk County police officers.).

For all of the above reasons, it is recommended that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



Rosemarie Maldonado  
Deputy Commissioner Trials

**APPROVED**

JUN 16 2013  
  
WILLIAM J. BRATTON  
POLICE COMMISSIONER

POLICE DEPARTMENT  
CITY OF NEW YORK

From: Deputy Commissioner Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER ANDY ESTEVEZ  
TAX REGISTRY NO. 941276  
DISCIPLINARY CASE NO. 2009-00584

Respondent was appointed to the Department on July 10, 2006. His last three annual performance evaluations were as follows: he received an overall rating of 4.5 "Extremely Competent/Highly Competent" in 2014 and 2013, and a 3.5 "Highly Competent/Competent" in 2010.

From February 16, 2009 to March 18, 2009, he was suspended from duty as a result of this case. He has since been on modified duty.

He has no prior formal disciplinary record.

For your consideration.



Rosemarie Maldonado  
Deputy Commissioner Trials